EHO CASE SUMMARIES FOR
WSBA ENVIRONMENT & LAND USE LAW NEWS LETTER
NOV 2009 EDITION

Pollution Control Hearings Board

Green v. Ecology and Walt Cox
PCHB No. 09-084
Order of Dismissal for Lack of Jurisdiction (September 15, 2009)

This case involved an appeal by a citizen asking the PCHB to increase a $36,000 penalty issued by Ecology to Walt Cox for Cox's failure to comply with the terms of an administrative order directing him to apply for coverage under the Construction Stormwater General Permit. In response to an Order to Show Cause and briefing by the parties on the question of whether the Board has jurisdiction to hear a case where the only relief sought is an increase in the penalty, the Board determined it had no jurisdiction.

In addition to the Board lacking authority to increase the penalty amount, the Board also concluded that Mr. Green lacked standing to bring the action because the penalized party had not appealed, and Mr. Green himself was not an aggrieved party as to the *penalty*. Mr. Green had failed to demonstrate how the amount of the penalty issued to Mr. Cox affected Mr. Green's legally protected rights or interests.

Leppell v. Olympic Region Clean Air Agency
PCHB No. 08-012
Findings of Fact, Conclusions of Law, and Order (August 17, 2009)

This case involved Mr. Leppell's appeal of a $15,635 civil penalty for illegal burning related to a metal salvaging operation in Forks, Washington. The violations were uncontested, but Mr. Leppell challenged whether he could be held liable as an absentee property owner since the metal salvaging operation was conducted by a third party not under his direction or control.

The Board initially denied summary judgment on the liability issue, on the basis that there were disputed issues of material fact surrounding Mr. Leppell's knowledge of and relationship to the metal salvage operation. After a contested hearing, the Board affirmed the penalty on the basis that Mr. Leppell was liable for the violations as the property owner who had given permission for the salvage operations to take place and because he should have done more to investigate and stop the unlawful burning when first made aware of problems at the site. But the Board reduced the penalty to $7,500 due to Mr. Leppell's limited involvement in the violations, his lack of prior violations, and the fact that the purposes of the penalty could still be served by the lesser amount.

First Romanian Pentecostal Church of Kenmore v. Ecology
PCHB Nos. 08-098 & 08-099
Findings of Fact, Conclusions of Law and Order (July 31, 2009)
See also, Order on Summary Judgment (May 22, 2009)

In September 2008, Ecology issued an enforcement order to the First Romanian Church of Kenmore requiring the Church to remove unpermitted fill and restore wetlands and buffers on its property adjacent to Bear Creek in eastern King County. At the same time, Ecology assessed a $48,000 civil penalty for the Church's unlawful discharge of pollutants into waters of the state. The Church appealed both orders to the Pollution Control Hearings Board.

The Church made two primary arguments: (1) that placing fill in a wetland does not constitute a discharge of pollutants into the wetland and (2) that the actions on site were taken by Church volunteers without the approval or permission of the Church's governing board. The PCHB addressed both of these arguments on summary judgment. With regard to the first argument, the Board concluded that the holdings and analysis in two prior PCHB decisions, as well as a Thurston County Superior Court decision, established controlling precedent for Ecology's position that placing fill in a wetland is a discharge of pollutants into waters of the state (citing *Pacific Topsoils Inc. v. Ecology*, PCHB Nos. 07-046 & 07-047 (2008), *Kariah Enterprises, LLC v. Ecology*, PCHB No. 05-021 (Corrected Order Granting Partial Summary Judgment, Jan. 6, 2005), and *Building Industry Ass'n. of Washington v. City of Lacey*, Thurston County Cause No. 91-2-02895-5 (1995)).

With regard to the second argument, the Church contended that a charitable organization can only be held liable for the actions of its volunteers if the organization solicited, directed, or consented to the volunteers' actions. The Board, using the legal standard advocated by the Church, concluded that because the Pastor and some Board members were present at the site during parts of the unpermitted activities, and because additional wetland violations occurred after the Church leaders were aware of the problem, the Church had in fact solicited or consented to the actions of its volunteers. The Board went on to conclude that even if the Church had not directed or authorized the violations, past Board precedent established a basis for concluding landowners can be held responsible for water quality violations that have occurred on their property without their direct action or authorization.

The Board also concluded on summary judgment that it was without jurisdiction to hear the Church's constitutional takings claim, and that the notice provided to the Church complied with all statutory requirements. The only issue remaining for trial was the reasonableness of the penalty. Following a two-day evidentiary hearing, the Board concluded that the penalty was reasonable. A key component in the Board's decision was the magnitude of the environmental damage caused by the activities of the Church members, which included the destruction of a substantial area of mature, forested wetland and part of a tributary to Little Bear Creek (one of only two documented salmon-bearing tributaries located in the upper reach of the Cedar-Sammamish watershed and known habitat for two endangered fish species, Chinook salmon and Steelhead trout).

The Board's decision is currently on appeal to Thurston County Superior Court.

Olga Water Users, Inc., and Alexander Taylor v. Ecology and Orcas Water Holdings, LLC
PCHB No. 08-123
Order Granting Motion for Summary Judgment (July 10, 2009)

Appellants challenged Ecology's approval of a change in purpose of use of a surface water certificate. Orcas Water Holdings, LLC (Orcas) requested a small portion of its hydropower right under the certificate be changed to community domestic use. No change was made in either the instantaneous quantity or the total annual quantity of the water right.

Likewise, there was no change in the season of use or the point of diversion. After initially denying the Respondents' motion to dismiss, the Board granted summary judgment to Ecology and Orcas on the question of whether approval of the change application was lawful.

Under the certificate, originally issued as part of a San Juan County Superior Court adjudication in 1970, water is diverted from Cascade Creek into Cascade Lake. Orcas uses the water stored in Cascade Lake for hydropower and for community domestic use. At times, excess water in the lake is spilled through a dam spillway and into Cascade Bay. Appellants challenged the change as violating the Endangered Species Act (ESA), State Environmental Policy Act (SEPA), and the public trust doctrine, and as impairing existing rights. Appellants also asserted that Ecology's tentative determination of the extent and validity of the water right was improper. Appellants were primarily concerned with how diverting water from Cascade Creek would impact fish. Appellants asserted that it was illogical to divert water from Cascade Creek into Cascade Lake if excess water had to be spilled from the lake.

The Board first found there was no impairment to "existing rights" because the Board has interpreted that phrase to mean harm to other water rights. Next, the Board recognized that water right appropriations of one cfs or less are categorically exempt from SEPA threshold determinations and the creation of an environmental impact statement (WAC 197-11-800(4)), so no SEPA analysis was required prior to approving the water right change. The Board also found that Ecology has no direct authority to enforce provisions of the ESA.

In evaluating the appropriateness of the change under water law, the Board noted there is no public interest test component under RCW 90.03.380 for evaluating a change in a surface water right (*citing Public Utility District No. 1 of Pend Oreille County v. Ecology*, 146 Wn.2d 778 (2002)), and that the availability of water is determined when the original permit is applied for, and not reexamined when a change or transfer of a water right is sought (*citing R.D. Merrill Co. v Pollution Control Hearings Board*, 137 Wn.2d 118 (1999)). The Board also stated that previous court decisions have held that the public trust doctrine pertains to the state's duty to protect the public's access to navigable waters and shorelands, and Ecology does not have any statutory authority to assume the state's public trust duties.

Appellants tried to establish the inadequacy of the Cascade Creek diversion as proof the water right was either relinquished or abandoned. The Board rejected both claims and concluded that Ecology's tentative determination of the extent and validity of the water right was proper. The Board found that the Appellants were essentially challenging the underlying adjudication decision made by the superior court, and that the Board had no authority to alter the court's decree.

Shorelines Hearings Board

Woodmans v. San Juan County
SHB No. 08-032
Findings of Fact, Conclusions of Law, and Order (May 13, 2009); and
Friends of the San Juans v. San Juan County and the Woodmans
SHB No. 09-010
Order Granting Motions to Dismiss (Sept. 29, 2009).

The Woodmans applied for a shoreline substantial development permit (SSDP) to add an extension to their existing bulkhead. The Woodmans argued that the bulkhead was necessary to prevent further erosion and to retain the existing trees and vegetative cover along the top of the bank. San Juan County denied the application. After a full evidentiary hearing, the Board reversed the County's denial and directed issuance of the SSDP.

In a factually detailed opinion, the Board made specific findings and conclusions regarding the impact of the bulkhead to surf spawning habitat and to coastal processes, as well as the feasibility of alternatives to extension of the bulkhead. The Board concluded that the proposed bulkhead extension was consistent with County policies. The findings included a determination that the installation of soft armoring could have negative impacts to the beach because it would require a mechanical anchoring system to be installed in the substrate of the beach. The Board also concluded that because the Woodman's' beach is a pocket beach protected on both ends by natural rock outcroppings, the concern regarding potential negative impacts of a bulkhead on other beaches due to wave reflection or sediment transport was not a factor. The Board also found that the proposed bulkhead would be located landward of both the ordinary high water mark and the mean high higher water, and therefore would not be built on smelt spawning habitat or impact smelt spawning. The Board's remand required the addition of two conditions to the Woodman's' SSDP as part of its Order to ensure it would be located above the OHWM and constructed in accordance with the prepared habitat management plan. The Board's decision was not appealed to Superior Court.

The County subsequently issued the permit as directed by the Board's order. The County's permit issuance was then appealed by Friends of the San Juans, who had been observers but not parties to the earlier appeal of the denial. Friends of the San Juans conceded that the permit was issued consistent with the Board's prior order but sought to challenge some of the findings and conclusions made in that order. The Board granted a motion to dismiss this second appeal on two alternate legal theories.

Under the first theory, law of the case, the Board concluded that reconsideration of issues which have been decided by the same court, or a higher court, in the same case, is generally prohibited. Under an alternate theory, the Board concluded what amounted to a ministerial act of reissuing a permit decision does not create a new appeal right. This analysis was based on the language in WAC 173-27-130(10) which provides that when a project has been modified in the course of review proceedings, and the local government is required to reissue the permit to incorporate those modifications, this process does not create a new opportunity for appeal of the permit.

Roberts v. Grant County & Ecology
SHB No. 08-027
Findings of Fact, Conclusions of Law, and Order (September 16, 2009)

This case involved an appeal of an administrative order and $5,000 civil penalty for construction and development activities at a residence within the Dune Lakes planned unit development on the shoreline of Moses Lake. Without any permits, Mr. Roberts had constructed a concrete-paver stairway down a steep slope, through a designated shoreline habitat protection zone, and installed a boatlift that connected to the shore by wooden planks for loading and mooring his boat. He did this based on his contention that the stairway was an allowable "low-impact trail" and the boat lift was not a "dock" subject to permit requirements.

The issue on appeal was whether this project violated the Shoreline Management Act (SMA), the conditional use permit (CUP) associated with the final plat in which his lot was located, and/or the covenants and restrictions (CC&Rs) required by the CUP.

After a site visit and contested hearing, the Board rejected Mr. Roberts' characterization of the concrete-paver stairway as a "low-impact trail" and determined that the removal of native vegetation and grading within the plat's protected habitat zone violated the conditions of the CUP, which had been made binding on the individual lot owners through the recorded plat restrictions and CC&Rs.

The Board also concluded that stairs and boat lift, which exceeded $5,000 in fair market value, constituted a substantial development under the SMA necessitating a permit. Roberts conceded other Dune Lakes residents would likely follow his lead if his project were allowed to remain, and the Board found evidence that at least two other homeowners had already done so. On this basis, the Board concluded that the order requiring removal of the unpermitted development and restoration of the shoreline was reasonable, as was the $5,000 civil penalty.

Kennerud v. Cowlitz County
SHB No.09-004 (2009)
Findings of Fact, Conclusions of Law, and Order (August 21, 2009)

The appellant Kennerud appealed a denial of a shoreline variance he was seeking to place a septic dispersal area within the applicable 100-foot shoreline setback from the Columbia River. The applicant's lot configuration did not have enough depth to place a septic drainfield more than 67 feet from the ordinary high water mark. When Mr. Kennerud purchased the lot, he believed he could use a recorded septic easement to transmit effluent from his property to a septic drainfield location on the adjoining lot. The neighbors, however, drilled a well within the required setback from the sewage transmission line, which rendered Kennerud's sewage easement unusable.

Mr. Kennerud's property was located in an area with similar residences on all the nearby riverfront lots, and he was able to meet the other required setbacks for building a single family residence on the parcel. The proposed septic design was an enhanced treatment system that would be located above the 100-year flood elevation. The design also had sufficient vertical separation from the water table to minimize or eliminate risk of groundwater contamination. The evidence did not reveal any history of erosion at the building site or any significant increase in the risk of future erosion if the septic tank setback was varied.

The Board found the project was consistent with other uses in the area and that the requested setback variance was the minimum necessary to afford relief. The Board further concluded that restricting the 7-acre property to recreational uses only would not allow reasonable use of the property. Under the unique facts of this case, the Board concluded that a setback variance could be allowed consistent with the SMA and the local master program. Ecology did not actively participate in the appeal, and Cowlitz County defended the variance denial.

Nora Leider, et al v. Point Ruston LLC; Town of Ruston and Ecology
SHB No. 09-005
Findings of Fact, Conclusions of Law, and Order (August 18, 2009)

A large group of individual citizens, each proceeding pro se, challenged a shoreline substantial development permit (SSDP) and conditional use permit (CUP) issued by the Town of Ruston to Point Ruston LLC to authorize construction of a hotel and related public use areas within the regulated shoreline. Point Ruston LLC proposed to construct a large, mixed-use development known as Point Ruston on an 82-acre site that was formerly the site of the ASARCO Tacoma smelter operation. Some of the site is within the Town of Ruston, some within the City of Tacoma.

The hotel is a part of this large redevelopment project along Commencement Bay. Portions of the hotel are 60 feet in height. The larger site itself is subject to a judicially approved Consent Decree for remediation of arsenic and heavy metals that occur throughout the site (EPA supervised). Part of the Consent Decree calls for a permanent, impervious cap on the site, to prevent further chemical releases to the air and water. A substantial portion of this impervious cap will consist of the planned Point Ruston development, including building foundations, roofs, and other hard surfaces. As part of environmental studies at the site, the developer also completed comprehensive view and traffic impact studies.

Because the ASARCO site dominated and took up the entire shoreline of the Town of Ruston, there has been no public access to the shoreline on the Point Ruston site for over 100 years. The Point Ruston development provides for substantial new access to the shoreline, including unobstructed views of the water from a long public promenade, and from other public spaces throughout the development. Approximately sixty-one percent of the site will be dedicated to publicly accessible parks, open space, and recreation areas, including the mile long promenade.

Applying a standing test set forth in previous Board decisions, the Board held that a number of Petitioners failed to demonstrate a personal, concrete, and particularized interests in views, traffic, or any other shoreline issues, and were without standing. For the Petitioners who were found to have standing, the Board concluded they failed in their burden to show traffic congestion or view obstruction in violation of the Shoreline Management Act.

In assessing allegations of view obstruction, the Board applied a well-established four-part test under RCW 90.58.310, finding there was no evidence to show that the proposed hotel would obstruct the views of a substantial number of residences, including views from the homes of several of the Petitioners. The Board also held that the proper comparison was between the view that existed on the site prior to demolition of the ASARCO smelter, and the view post-development, because of the long-term and historic presence of the ASARCO plant in the area. The Board concluded the Petitioners would continue to have exceptionally expansive and scenic views from their residences, and so there was no violation of RCW 90.58.320. The Board also considered that the public would have substantial new access to the shoreline and greatly enhanced views.

Although many of the Petitioners attempted to present evidence and argument related to possible exposure to toxics and the manner in which contractors were conducting the clean-up at the larger site, the Board held that it was without jurisdiction over site remediation and construction practices associated with that activity, and that it could not redress such injuries.

The Board affirmed the Town's issuance of a SSDP and CUP for this portion of the Point Ruston development.

McQuarrie v. City of Seattle; Stan Hanson, Reed Construction, Inc., Fin-Me-Oot I LLC, and John Reed Hunter
SHB No. 08-033
Findings of Fact, Conclusions of Law, and Order (August 5, 2009)

The City of Seattle issued a DNS and shoreline substantial development permit (SSDP) for a large house on a steep slope with a history of landslides. The neighbors, concerned about damage to their home from the excavation and foundation work, appealed on several grounds. A majority of the Board concluded that the City's negative threshold determination was not clearly erroneous under SEPA, and that the SSDP complied with the City's master program and the Shoreline Management Act (SMA). This case contains lengthy findings and conclusions about the required scope of a SEPA review in an environmentally critical area in Seattle.

The Board concluded that the Seattle Municipal Code defined and limited the scope of environmental review necessary within the environmentally critical area, requiring the City to evaluate compliance with specific Code provisions and whether there were significant impacts not addressed by the Code. A majority of the Board concluded that the City met the standards of the code, and had "reasonably sufficient information" upon which to conclude that the development provided for complete stabilization of all on-site and adjacent properties. This conclusion was based on factual findings that city engineering staff had been involved in the residential project from its inception through the installation of the foundation. The City was also aware and evaluated information from adjacent property owners, who asserted that foundation was negligently installed and caused damage to the adjacent residence(s). The Board also concluded that despite numerous problems with the installation of the deep pile foundation at the site, the City properly evaluated potentially significant impacts on environmentally critical resources not already addressed in Code provisions. The Board concluded that the City had adequate information to conclude that soils movement on the adjacent property, if it had occurred at all, was not significant, and that a DNS was therefore a proper determination.

The Board applied the "clearly erroneous" standard to review and accorded substantial weight to the City's SEPA decision, noting the long and disputed record before both the Board and the City when it issued the DNS. The Board also found that the Petitioners had failed to meet their burden to demonstrate a violation of the shoreline master program, or the SMA on issues related to runoff, lot coverage, or archeological resource matters.

The dissenting opinion concluded that standard construction practices had not been followed at the site as the foundation was installed and that additional information was reasonably available to the City to answer concerns about slope stability. Thus, the dissent reasoned that greater scrutiny should have been applied, and that the City erred in issuing a DNS.

Iddings v. Mason County
SHB No. 08-031
Findings of Fact, Conclusions of Law, and Order (June 22, 2009)

The Shorelines Hearings Board affirmed a shoreline substantial development permit (SSDP) issued by Mason County and a conditional use permit (CUP) approved by Ecology allowing the applicants (Griffiths) to construct a driveway from Dewatto Beach Road to a building site at the top of an embankment on their property. The Griffiths had no other means for vehicular access to the building site on their property. Efforts to obtain alternate access across nearby properties had been rebuffed.

The petitioner Iddings, an owner of nearby property, challenged the permit approvals as inconsistent with policies applicable to shorelines of statewide significance. Mr. Iddings expressed particular concern over the impact the project might have on Pigeon Guillemots' habitat located on the sandy bluff involved.

The Board concluded that the numerous conditions placed on the project would avoid harm to Pigeon Guillemots, their nests, and their habitat on the bluff. The nearby beach area and shoreline environment would not be harmed by the driveway because the project was separated from the beach by Dewatto Beach Road. The Board further concluded that the engineering detail provided by the applicant was sufficient for shoreline permit review even though further engineering detail would likely be required to obtain construction permits from Mason County.

The Petitioner's argument that the project constituted piecemealing under the shoreline management act was rejected by the Board under the circumstances of the case. The fact that the applicant applied for the driveway approval before seeking a permit for a house was considered a necessary first step in evaluating the viability of the property for the planned retirement residence, not an artificial division of the project to avoid environmental review. The Board agreed with the decisions by Mason County and Ecology that the criteria for issuance of the SSDP and the CUP had been demonstrated. The Board's approval was conditioned on the applicants monitoring and reporting the project's impacts on Pigeon Guillemots for five years after the start of construction.

Concerned Neighbors for East Bay Drive v. City of Olympia and Mission Street Investors, LLC
SHB No. 08-036
Findings of Fact, Conclusions of Law, and Order (June 9, 2009)

This case involved a challenge to the City of Olympia's decision to approve a shoreline substantial development permit (SSDP) to build nine two-story townhomes on a one and one-half acre parcel of land on the east shore of Budd Inlet in Olympia. The appeal was brought by the five owners of the houses located behind the proposed location of the townhomes who would have their current waterfront views substantially impaired or effectively eliminated. The question before the Board was to what extent a proposed development within shoreline jurisdiction, below 35 feet in height, must be required to minimize significant view impacts on existing residential neighbors.

The Board concluded that in Olympia, based on the local shoreline master program (SMP), the City is required to undertake efforts to minimize view impacts. The Board concluded that the evidence at hearing demonstrated the City had not adequately considered the arrangement and design of the buildings for the purpose of lessening the view impact on the neighbors. The Board acknowledged that the permit applicant had made some effort to reduce view impact, but

concluded the effort was insufficient to satisfy the requirements of the local SMP, given the strong language in the local program and the substantial nature of the view impacts that would be caused by this development. On this basis, the Board reversed the permit approval, and remanded back to the City to consider and incorporate additional arrangement and design options consistent with its decision.

The Board's decision was appealed to Thurston County Superior Court.

TG Dynamics v. San Juan County
SHB No. 08-030
Findings of Fact, Conclusions of Law, and Order (May 26, 2009)

This case involved a challenge to San Juan County's denial of a shoreline substantial development permit (SSDP) for construction of a joint-use community dock at a new 4-lot waterfront subdivision on Blind Bay, Shaw Island. The County was concerned about the possibility that the "joint-use" nature of the facility was a fiction, because the entire subdivision was owned by one person, and there was no guarantee the three other lots would ever be developed.

During the course of the appeal, the design for the dock changed twice because the parties disagreed as to whether the dock should be designed to serve just the one lot that presently had a residence or the entire 4-lot subdivision at full build-out. The first design had been for the longest and largest dock facility, with four mooring spaces. The second design had been the smallest facility, essentially a single-use dock to meet the needs of the one property owner who currently owned all four lots of the subdivision. After hearing, the Board remanded the denial for the County to issue a permit approving the third design, which was of a medium length and would provide adequate moorage space for four boats. The approval was subject to the condition that no construction could begin until after the final plat approval was received, the final joint use agreement was recorded, and a building permit for a second residence was obtained.

The Board concluded that, as conditioned, the dock was properly considered a joint-use community dock. The Board further concluded that the dimensions satisfied the San Juan County Code, and that Petitioners had satisfied their burden of demonstrating that alternative moorage was not adequate or feasible. The Board acknowledged that while there was some uncertainty as to when the subdivision might be fully built out, such uncertainty is not unlike that faced by any new subdivision (particularly in these economic times). It found that the proposed joint use agreement, which will bind any future owners in perpetuity and prevent any individual docks within the plat, furthers the County's goals of encouraging joint use and avoiding the porcupine effect in new waterfront subdivisions.

Hydraulics Appeals Board

Skagit County Farm Bureau v. Washington Department of Fish & Wildlife
HAB 09-001
Order Granting Stay (September 11, 2009)

The Washington Department of Fish & Wildlife (WDFW) obtained Hydraulic Project Approval (HPA) for a levee setback and estuary restoration project in the Leque Island area of Snohomish County. A levee placed on the property many years ago had transformed the then-existing estuary to agricultural land. In the ensuing years the property was farmed with varying levels of success until the property was sold to WDFW by the Leque family in 1994. Since 1994, WDFW has rented the property to local farmers, but in recent years, interest in farming the property has waned.

The site is subject to drainage problems, and the tidegates and levees are dilapidated. Beginning in 2004, WDFW partnered with Ducks Unlimited of Washington to develop a multi-purpose use on the property. The plans included constructing a new dike, set back from the existing dike, and then breaching the existing dike to allow 80-110 acres to revert to its natural condition as saltwater estuary.

WDFW began the standard HPA application process, but then changed the application to proceed under the special streamlined provisions in RCW 77.55.181 governing fish habitat enhancement projects. The proposal was approved pursuant to RCW 77.55.181 without the necessity for local government hearings or permits.

The Skagit County Farm Bureau appealed the approval arguing that the contemplated actions would reduce the amount of property currently available for agricultural uses in contravention of local land use plans. The Farm Bureau further contended that the project was not properly considered a fish habitat enhancement project under RCW 77.55.181. The Farm Bureau moved for a stay to prevent continued activity on the project during the pendency of the case.

The Board granted the stay based on its conclusion that the levee setback and estuary restoration project, while laudable, was not the type of fish habitat enhancement project qualifying for streamlined processing under RCW 77.55.181. The Board construed the plain language of the fish habitat enhancement processing statute and concluded that it was limited to the three types of activity listed. The WDFW project was directed to estuary restoration, which was not one of the listed fish habitat enhancement activities. Accordingly, the project should not have been processed under the streamlined provisions in RCW 77.55.181 and a stay was appropriate. After the stay was entered, WDFW rescinded the permit and the case was dismissed by stipulation.